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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM T. BRIGHT, ED KING, DEE BARWICK, LOWELL LAWSON, FRANK JORGENSEN and BRIGHT OF AMERICA, INC., a West Virginia corporation,

Petitioners,

vs.

QSP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT QSP, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court exercise its discretion to grant review on a writ of certiorari where the sole issue raised is the propriety of the Court of Appeals for the Fourth Circuit's review of the record when the Court of Appeals followed the uniformly recognized standards pursuant to Fed. R. Civ. P. 50?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
A. BOA's Agreement With QSP To Fulfill Allegro, Inc.'s Contract With QSP	2
B. BOA's Continuing Relationship With QSP And Certain Negotiations Regarding QSP's Possible Purchase of BOA Stock	3
C. The Proceedings Below	4
REASONS FOR DENYING THE WRIT	6
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Berry v. United States, 312 U.S. 450 (1941)	8
Brown v. CSX Transp., Inc., 18 F.3d 245 (4th Cir. 1994)	9
Case v. Shepard, 84 S.E.2d 140 (W. Va. 1954)	6
Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp., 944 F.2d 1131 (3d Cir. 1991)	9
Caudill v. Farmland Industries, Inc., 919 F.2d 83 (8th Cir. 1990)	10
Connell v. Sears, Roebuck & Co., 722 F.2d 1542 (Fed. Cir. 1983)	8
Cox v. City of Freeman, 321 F.2d 887 (8th Cir. 1963)	8
Dean v. Trans World Airlines, Inc., 924 F.2d 805 (9th Cir. 1991)	7
First Dakota Nat. Bank v. St. Paul Fire & Marine Ins. Co., 2 F.3d 801, 808-09 (8th Cir. 1993)	10
Galloway v. United States, 319 U.S. 372 (1943)	8, 10
Gay v. Petsock, 917 F.2d 768 (3d Cir. 1990)	7
Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 345 (1993)	9
Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1578 (1992)	9
PH Group Ltd. v. Birch, 985 F.2d 649 (1st Cir. 1993)	9
Persinger v. Norfolk & Western Ry. Co., 920 F.2d 1185 (4th Cir. 1990)	7

	Page
Phelps v. Yale Sec., Inc., 986 F.2d 1020 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993)	9
Pinnacle Port Community Ass'n, Inc. v. Orenstein, 952 F.2d 375 (11th Cir. 1992)	9
Romero v. International Harvester Co., 979 F.2d 1444 (10th Cir. 1992)	9
Sartor v. Arkansas National Gas Corp., 321 U.S. 620 (1944)	12
Schwimmer v. Sony Corp. of America, 459 U.S. 1007 (1982)	8
Shanks v. Wilson, 86 F. Supp. 789 (S.D. W.Va. 1949)	6
Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967)	10
St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003 (4th Cir. 1985)	7
Stephens v. C.I.T. Group/Equipment Financing, Inc., 955 F.2d 1023 (5th Cir. 1992)	9
United States v. Johnston, 268 U.S. 220 (1925)	6
Walter v. Holiday Inns, Inc., 985 F.2d 1232 (3d Cir. 1993)	7
Weldy v. Piedmont Airlines, Inc., 985 F.2d 57 (2d Cir. 1993)	7, 9
Wilson v. City of North Little Rock, 801 F.2d 316 (8th Cir. 1986)	10
STATUTES AND RULES	
U.S. Constitution, Amendment VII	6, 7, 10, 12
Fed. R. Civ. P. 50	*passim*
Fed. R. Civ. P. 50(a)(1)	6, 7, 8, 9

	Page
Fed. R. Civ. P. 56(c)	11
Fed. R. Evid. 401	11
28 U.S.C. § 1254(1)	1
W.Va. Code § 46-8-319	4
Sup. Ct. R. 10	
MISCELLANEOUS	
9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971)	7
A Standards of Review Primer, 125 F.R.D. 319 (1989)	10
R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 173 (7th ed. 1993)	11

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a) is reported at 20 F.3d 1300 (4th Cir. 1994). The order of the United States District Court for the Southern District of West Virginia is located at Pet. App. 24a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 5, 1994 and a petition for rehearing was denied on April 29, 1994. Respondent received the petition for a writ of certiorari on August 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent QSP is a wholly-owned subsidiary of The Reader's Digest Association, Inc.[1] It is engaged nationwide in the business of assisting in fund-raising for youth organizations, including primary and secondary schools (2a).[2] Petitioner BOA was engaged in the supply of gift products to the fund-raising industry, including QSP and QSP's competitors (2a).

In August, 1986, QSP and BOA executed a written supply contract (the "1986 Supply Agreement"), under which BOA would purchase or manufacture products for QSP programs, and then warehouse the products and distribute them after sales were made by QSP. Under this arrangement, BOA assumed the risk of its inventory; *i.e.*, if any products that BOA had selected and purchased for QSP's sales were not actually sold, the cost of the unsold products, as well as the risk of inventory obsolescence, would be borne by BOA. QSP agreed to pay BOA 30 percent of the retail price for each BOA gift item sold by QSP. BOA determined the products that would be included in its catalogs and set the retail price that QSP had to charge for these products (2a).

In September, 1988, in order to convince QSP to extend the 1986 Supply Agreement, BOA sent a letter to QSP describing the purported advantages that BOA provided to QSP, including prize programs that had been supplied by BOA to QSP for several years. These prize programs provided incentives to students to sell BOA gift products and boosted BOA's sales and revenues. As BOA emphasized in its letter, prizes had always been provided free of charge to QSP. After receiving BOA's letter, QSP extended the 1986 Supply Agreement until June 30, 1990 (3a).

A. BOA's Agreement With QSP To Fulfill Allegro, Inc.'s Contract With QSP

In February, 1989, QSP learned that Allegro, Inc. of Atlanta, Georgia ("Allegro") was going out of business (3a-4a). Allegro

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[1] Respondent QSP has no subsidiaries (except wholly owned subsidiaries). *See* Sup. Ct. R. 29.1.

[2] Citations to the Petitioners' Appendix shall hereafter be abbreviated as "____a."

warehoused and distributed food products purchased by QSP and sold by QSP through the fund-raising organizations. QSP asked BOA if BOA would be interested in substituting for Allegro (4a).

BOA agreed to undertake Allegro's obligations for the spring of 1989, as well as for subsequent sales seasons, on the same terms that Allegro had with QSP (4a). Allegro's agreement with QSP was very different from BOA's 1986 Supply Agreement. QSP bought and paid for all the food products and any catalogs to promote the product. Allegro did not manufacture or purchase the food products, but merely distributed them when QSP made a sale. Allegro bore none of the risks associated with unsold, excess or obsolete inventory. BOA agreed to fulfill Allegro's contractual obligations at the same 30 cents per item rate that QSP had paid Allegro (4a).

B. BOA's Continuing Relationship With QSP And Certain Negotiations Regarding QSP's Possible Purchase of BOA Stock

On several occasions in the spring of 1989, BOA and QSP representatives met to discuss a possible sale of BOA stock to QSP (3a). BOA also took certain steps to enhance its performance under the 1986 Supply Agreement and its agreement to fulfill Allegro's relationship with QSP. These included hiring people to work on BOA's computer systems and building a cold storage unit (4a). BOA received the benefits from these measures and sold those benefits to Russ Berrie, Inc. in late 1990 (13a).

On August 4, 1989, BOA's chairman, Bill Bright, wrote a letter to QSP purportedly memorializing an agreement with QSP (3a). The August 4th letter stated, *inter alia*, that the parties had agreed that QSP would purchase an 80% equity interest in a new BOA entity for $7,500,000, but made no mention of any alleged joint venture under which BOA was to fulfill the Allegro food inventory (3a).

On August 14, 1989, QSP's president, Tom Belli, responded to Mr. Bright by letter stating that any discussions regarding

a possible purchase of BOA stock by QSP were only preliminary and denying that any agreement had been reached (3a).

Despite full knowledge of QSP's position that there was no joint venture between QSP and BOA, BOA continued to supply QSP with gift products pursuant to the 1986 Supply Agreement and to fulfill Allegro's obligations for 30 cents per item. As a matter of fact, BOA continued to perform these services after BOA first commenced litigation against QSP in October, 1989 seeking a declaratory judgment that QSP had agreed to purchase 80% of BOA's stock (5a).

C. The Proceedings Below

BOA's Amended Complaint, filed in April, 1990, sought compensatory damages based on theories of an alleged oral contract to acquire 80% of BOA stock for a BOA/QSP joint venture (Count One), promissory estoppel (Count Two), fraud and misrepresentation (Count Three), interference with prospective contractual relations (Count Four), unjust enrichment (Count Five), and conversion (Count Six).

Prior to trial, the district court dismissed BOA's claim for breach of an oral contract. The court held that the alleged agreement to buy BOA's stock was unenforceable under the West Virginia Statute of Frauds (W.Va. Code § 46-8-319) and because there had never been a sufficient meeting of the minds to establish a contract. At trial, BOA's claims for interference with prospective contractual relations (Count Four) and conversion (Count Six) were dismissed at the close of BOA's case. The case went to trial on BOA's claims of promissory estoppel, fraud and misrepresentation, and unjust enrichment.

BOA's claims of promissory estoppel and fraud and misrepresentation, like its breach of contract case, were based on its contention that QSP had agreed orally to a joint venture or a purchase of BOA stock. Its unjust enrichment claim was based on an argument that BOA only agreed to undertake Allegro's obligations because of the alleged joint venture and, therefore, when the joint venture was not consummated, QSP was somehow unjustly enriched (4a).

At the close of the evidence, the three claims were presented to the jury in the form of written interrogatories. The jury, after returning three verdict forms, found for BOA on unjust enrichment and awarded $2 million in compensatory damages. On a fourth verdict sheet, the jury found for QSP on the claims for fraud and promissory estoppel (5a). The district court denied QSP's motion for judgment as a matter of law (5a).

The Court of Appeals for the Fourth Circuit reversed the trial court's denial of QSP's motion for judgment as a matter of law.[1] The Court then "review[ed] the facts underlying [BOA's unjust enrichment claim] in a light most favorable to BOA" (10a). It noted "at the outset a general weakness in BOA's position in this case. BOA has been unable to prove any breach of contract, promissory estoppel or fraud on the part of QSP" (6a). The Court held that because the jury had found for QSP on the promissory estoppel and fraud claims, "BOA assumed the Allegro contract at its own business risk ..." (15a).

The Court also held that BOA's contention that it had assumed the Allegro contract "only as a part of a joint venture rings hollow" (14a). None of BOA's written joint venture proposals even mentioned its assumption of the Allegro contract. Furthermore, BOA continued to fulfill the Allegro orders after QSP denied in writing that any joint venture had been formed (14a).

Applying West Virginia common law on unjust enrichment, the Fourth Circuit held that:

> The above BOA services [which BOA claimed unjustly enriched QSP] cannot constitute an unjust enrichment of QSP because (1) they were governed by preexisting express contracts, and (2) they did not confer any benefit on QSP that QSP was not entitled to receive (11a).

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[1] The appeals court also affirmed the district court's grant of summary judgment on BOA's breach of contract claim, as well as several procedural rulings by the district court (2a).

Under "well-rooted" West Virginia contract law, "'[a]n express contract and an implied contract, relating to the same subject matter, can not co-exist.' *Case v. Shepard*, 84 S.E.2d 140, 144 (W. Va. 1954); *see also Shanks v. Wilson*, 86 F. Supp. 789, 794 (S.D. W.Va. 1949)" (11a). In addition, "QSP did not receive any benefits it was not entitled to receive" under the contracts with BOA (12a). Accordingly, the Court found that there was no legally sufficient evidentiary basis for a reasonable jury to have found for BOA on the unjust enrichment claim (10a-15a).

The Fourth Circuit, therefore, held "that the district court should have granted QSP's motion for judgment as a matter of law on the unjust enrichment claim" and remanded the case to the district court with directions that judgment be entered for QSP (15a-17a). BOA's motion for rehearing was subsequently denied (26a-27a).

REASONS FOR DENYING THE WRIT

I

This case does not present any issue for review. Sup. Ct. R. 10. Petitioner's claim that the Court of Appeals' review of the record raises questions under the Seventh Amendment to the Constitution and under Fed. R. Civ. P. 50 is simply an attempt to have this Court conduct another detailed review of the evidence. As this Court noted in *United States v. Johnston*, 268 U.S. 220, 227 (1925): "we do not grant certiorari to review evidence and discuss specific facts."

The Fourth Circuit reviewed this case as required by Fed. R. Civ. P. 50(a)(1), giving proper deference to the findings of the jury at trial. The Court raised no constitutional or federal issue regarding the Seventh Amendment, and made no independent factual findings, but simply decided this case by applying West Virginia common law principles to the factual findings of the trial court and the jury.

II

BOA contends, however, that the Fourth Circuit misapplied the standard of review for Rule 50 motions and violated the

Seventh Amendment. This argument is meritless. The only party seeking to have this Court weigh evidence is BOA, by its inclusion in its appendix of oral testimony of its own officers that a joint venture existed (29a-33a).

Rule 50(a)(1) of the Federal Rules of Civil Procedure provides, in relevant part, that

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

It is well-settled that when reviewing a grant or denial of a judgment as a matter of law, a court of appeals must review the evidence in the light most favorable to the non-moving party. *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993); *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57, 59-60 (2d Cir. 1993); *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991); *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1187 (4th Cir. 1990); *Gay v. Petsock*, 917 F.2d 768, 771 (3d Cir. 1990); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971). The Fourth Circuit in this case stated explicitly that it was following that standard (10a).

Rule 50(a)(1) was intended to be used in conjunction with all of the factual findings in a given case. To avoid the Seventh Amendment's prohibition against a court's invading the jury's fact finding role, an appellate court "must take into account the 'uncontradicted and unimpeached' evidence in support of the moving party," (*St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1008 (4th Cir. 1985) (citation omitted)) and must give deference to factual findings established by the jury and by the district court. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971). A judgment as a matter of

law obviously does not violate the Seventh Amendment's guarantee of trial by jury. *See Galloway v. United States*, 319 U.S. 372 (1943); *Berry v. United States*, 312 U.S. 450 (1941); *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542 (Fed. Cir. 1983); *Cox v. City of Freeman*, 321 F.2d 887 (8th Cir. 1963).

Rule 50 was amended in 1991 to eliminate the distinction between a "directed verdict" and a "judgment notwithstanding the verdict." These concepts are now both incorporated in the term "judgment as a matter of law." As stated in the Advisory Committee's notes on the 1991 Amendments:

> In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court should then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

Here, because the jury found in favor of QSP on the issues of promissory estoppel and fraud and misrepresentation, QSP was entitled to have the evidence on those issues reviewed in the light most favorable to it. Viewing that evidence in a light most favorable to QSP, and the unjust enrichment evidence in the light most favorable to BOA, the Fourth Circuit held that no evidence had been presented which was legally sufficient to support BOA's unjust enrichment claim. Thus, the Court of Appeals applied the correct standard.

III

BOA's contention that there exists a split in authority in the circuit courts of appeals regarding standards of review under Rule 50(a)(1) is also meritless. This argument is taken almost verbatim from Justice White's dissent from a denial of certiorari in *Schwimmer v. Sony Corp. of America*, 459 U.S. 1007 (1982). Justice White's dissent has been rendered moot by the 1991 Amendments to Rule 50.

In his dissent in *Schwimmer*, Justice White surveyed the standards of review used at that time for considering a motion for judgment notwithstanding the verdict and found that while most circuits viewed "all the evidence" in a light most favorable to the nonmoving party, the Eighth Circuit viewed "only evidence which supports the verdict winner", and the First and Third Circuits considered evidence which supports the nonmoving party and "uncontradicted, unimpeached evidence from disinterested witnesses." *Id.* BOA contends that this split in circuits still exists today.

BOA's reliance upon Justice White's 1982 dissenting opinion is, however, misplaced. Rule 50(a)(1), as amended in 1991, now sets forth a uniform standard that a judgment as a matter of law shall be granted if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."

Subsequent to the 1991 amendment, the courts of appeals have applied this uniform standard for review of denial of Rule 50 motions and have reviewed the entire record to determine whether there is "no legally sufficient evidentiary basis" for the jury's award. This record review is uniformly conducted in a light most favorable to the nonmoving party.

The Fourth Circuit adhered to this standard in the instant case, as it does routinely in other cases (10a). *See also Brown v. CSX Transp., Inc.*, 18 F.3d 245 (4th Cir. 1994). Other circuit courts do the same. *See, e.g., Pinnacle Port Community Ass'n, Inc. v. Orenstein*, 952 F.2d 375 (11th Cir. 1992); *Romero v. International Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992); *Gillette v. Delmore*, 979 F.2d 1342 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 345 (1993); *Henderson v. DeRobertis*, 940 F.2d 1055 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1578 (1992); *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993); *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023 (5th Cir. 1992); *Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp.*, 944 F.2d 1131, 1137 (3d Cir. 1991); *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57 (2d Cir. 1993); *PH Group Ltd. v. Birch*, 985 F.2d 649, 653 (1st Cir. 1993). *See also* S.

Childress, *A Standards of Review Primer*, 125 F.R.D. 319, 331 (1989).

BOA, as did Justice White, relies heavily on the Eight Circuit's standard as set forth in *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967). More recent Eighth Circuit cases, even prior to the 1991 Amendments to Rule 50, do not follow *Simpson* and apply a standard which is consistent with those applied by the other circuits. *See, e.g., Caudill v. Farmland Industries, Inc.*, 919 F.2d 83 (8th Cir. 1990); *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir. 1986). In any event, the Eighth Circuit's present rule is consistent with Rule 50 and all other circuits: "[a] motion for judgment as a matter of law 'should be granted only when all the evidence points one way and is susceptible of no reasonable inferences sustaining [the prevailing party's] position'." *First Dakota Nat. Bank v. St. Paul Fire & Marine Ins. Co.*, 2 F.3d 801, 808-09 (8th Cir. 1993) (citations omitted). Thus, the standard in all circuits is that a Rule 50 motion will be granted only if the review of the record establishes no legally sufficient evidentiary basis for the jury's finding.

Galloway v. United States, 319 U.S. 372, *reh'g denied*, 320 U.S. 214 (1943), does not advance BOA's position. First, *Galloway* was decided before the adoption of Rule 50, much less the 1991 amendments. Second, *Galloway* involved a directed verdict entered before plaintiff's claim reached the jury. Here, the jury considered the evidence relating to BOA's claims of promissory estoppel and fraud and misrepresentation and rejected BOA's contentions. Moreover, even Justice Black's dissent in *Galloway*, which BOA cites, emphasized that directed verdicts do not always infringe on a litigant's Seventh Amendment right to have issues of fact determined by a jury. 319 U.S. at 407 (Black, J., dissenting).

Finally, even if there were still a split in the circuits on the standard of review, the Fourth Circuit's decision would have been correct under any one of the three articulated standards. The Court found that there was no evidence *at all* that could support BOA's claim that the services that allegedly unjustly enriched QSP had been performed pursuant to a joint venture,

given the district court and jury's findings that there had been no joint venture, and that the services in question were performed in connection with ongoing contractual relationships with QSP.

When the resolution of a conflict among the circuits is irrelevant to the outcome of the case, no basis for the granting of the writ is stated. R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 173 (7th ed. 1993) (discussing reasons for denial of certiorari in *Sommerville v. United States*, 376 U.S. 909 (1964)).

IV

BOA's argument that the Fourth Circuit improperly used a "materiality" standard (Petition at pp. 9-11) also has no merit.[4] The Fourth Circuit did not adopt a new or different standard of review for Rule 50 motions.

Petitioners argue that by using the word "materiality" in footnote 3, the Court of Appeals was adopting an inappropriate standard, *i.e.*, the standard usually applied to motions for summary judgment.[5] Petitioners argue that after trial has begun, the materiality of all relevant facts is presumed under Fed. R. Evid. 401; therefore, the summary judgment standard is inappropriate.

The Fourth Circuit, however, defined its use of the word "materiality" as "the place that the disputed fact occupies within

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[4] Footnote 3, which begins at 15a, reads, in relevant part:

> Our dissenting colleague points to the existence of disputed facts before the jury, but of course there are contested facts in most of the commercial disputes that come before us. The critical question is one of materiality, *i.e.*, the place that the disputed fact occupies within the relevant legal framework.

[5] Under Fed. R. Civ. P. 56(c), summary judgment is to be granted before trial when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." It is therefore appropriate, in ruling on or reviewing a ruling on a summary judgment motion, for a court to decide which facts are material.

the relevant legal framework." (15a) The plain meaning of footnote 3 is that the Court considered all of the evidence, and determined whether that evidence provided a legally sufficient evidentiary basis for unjust enrichment (*i.e.*, were the facts "within the relevant legal framework" for unjust enrichment) under West Virginia law. That is the standard under Rule 50.

The Fourth Circuit majority criticized the dissent's reference to disputed facts regarding a joint venture because BOA's alleged disputed facts "cannot be squared with the judge's and jury's conclusions" (16a). The majority further criticized the dissent for failing to recognize "the undisputed core of this case" that the services performed by BOA were in connection with its ongoing contractual performance with QSP (16a).

The only case cited by BOA on this point is *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620 (1944). *Sartor* involved a motion for summary judgment, not a motion for judgment as a matter of law. The lower court had granted summary judgment on the basis of eight expert witness affidavits. This Court overturned the grant of summary judgment because the credibility of expert witnesses should have been left for the jury. Here, the jury heard all of BOA's evidence regarding the existence of a joint venture and, after assessing the credibility of that evidence, found that there was no basis for a joint venture. The Fourth Circuit gave proper deference to those jury findings.

V

Petitioners' last argument is that QSP raised issues on appeal not raised in the trial court, and that the Fourth Circuit erred in considering these issues. Specifically, BOA contends that QSP did not raise as a defense at trial that BOA had agreed to fulfill the Allegro contract, and emphasizes that QSP objected to the introduction of the QSP/Allegro contract at trial. Once again, BOA's argument does not impact upon the Seventh Amendment, but is largely factual. Its consideration would require this Court to examine the factual record, which is not the function of this Court on certiorari.

This argument also has no support in the record. First, that BOA agreed to fulfill the Allegro inventory for 30 cents per item was undisputed at trial (11a). As the Fourth Circuit noted in its opinion, all the allegations regarding the terms of the Allegro contract, and the terms of BOA's agreement to fulfill that contract, were also undisputed (4a). Second, QSP's position is not and never was based on a contention that the Allegro contract was assigned to BOA. Rather, QSP's position is based on the undisputed evidence presented at trial that QSP and BOA had an agreement whereby BOA would perform the same services as Allegro had for the same price (11a). QSP argued on appeal, as it did at trial and in the post-trial motions, that BOA agreed to perform the same services that Allegro had been performing for the same price.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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